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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Nos. 348, 349, and 350

■

348 MRS. JOHN HILLEY, *Petitioner*

v.

WID SPIVEY, SHERIFF, *Respondent*

■

349 DAISY LARGENT, *Petitioner*

v.

JACK REEVES, *Respondent*

■

350 TULLY B. KILLAM, *Petitioner*

v.

CITY OF FLORESVILLE, *Respondent*

■

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioners' Application for Leave to File Out of Time Joint Motion for Rehearing and PROPOSED JOINT MOTION

HAYDEN C. COVINGTON
Attorney for Petitioners

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioners' Application for Leave to File Out of Time Joint Motion for Rehearing and PROPOSED JOINT MOTION

TO THE HONORABLE UNITED STATES SUPREME COURT:

Now come the above named petitioners in the above entitled and numbered causes and present this their application for leave to file out of time and urge their joint motion for rehearing.

At the time of this Court's action on the petitions for writs of certiorari it was assumed that the reason for denial of the writs was that the judgments of the Texas Court of Criminal Appeals were based on an adequate non-federal question, to wit, a recognized rule of procedure of the State of Texas on which the judgment of the state court was final. For such reason alone at such time the petitioners did not ask for a rehearing.

Since the denial of the petitions for writs this court has recently on December 21, 1942, in Nos. 558 and 559, indicated that petitioners' contention with respect to the right to the writ of habeas corpus in the state courts of Texas may be correct.

Petitioners felt that the questions had been fully presented and argued in the petitions for writs of certiorari and supporting briefs; but the aforesaid expression of this Court in the pending *Largent* and *Jamison* cases (Nos. 558 and 559) indicates that the Court inadvertently overlooked the same question presented in these cases; and therefore this motion is made to recall the Court's consideration of that question. This motion presents a concrete example of the *Texas rule* concerning which this Court desires enlightenment from counsel.

If it is held that the writ of habeas corpus resorted to by petitioners is a proper remedy then such will require a reconsideration of the questions presented in these petitions.

In all the circumstances and in view of said recent expression of this Court it seems fitting and proper that this Court reconsider the petitions for writs of certiorari.

Petitioners attach hereto and make a part hereof their proposed motion for rehearing.

Petitioners would show that the judgments against them are respectively for fines. They have executed and filed good and sufficient supersedeas bonds to indemnify respondents in the manner required by law. Petitioners are now each at large and have their liberty under said bonds and have not been taken into custody since denial of writs of certiorari by this Court. Therefore questions presented in the motion for rehearing are not moot.

These three cases present the same common question of availability of the remedy of habeas corpus in the courts of Texas and substantially similar questions as to validity of the ordinances involved. Because of these common and similar questions it is suggested that the Court permit the filing of a joint motion for rehearing.

WHEREFORE petitioners pray that the Court grant this application, that the motion be allowed to be filed and that the Court grant such other and further relief as appears proper and necessary in the circumstances.

MRS. JOHN HILLEY, *Petitioner*
DAISY LARGENT, *Petitioner*
TULLY B. KILLAM, *Petitioner*
By HAYDEN C. COVINGTON
Attorney for Petitioners

■

CERTIFICATE

I, Hayden C. Covington, do hereby certify that the foregoing application for leave to file out of time a joint motion for rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

HAYDEN C. COVINGTON
Attorney for Petitioners

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioners' Joint Motion for Rehearing Duly Filed Pursuant to Leave of Court

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

May it please the court: Now come the above named petitioners and present this their motion for rehearing

within the sound discretion of the Court allowing the filing of said motion *out of time* at the present term of Court, and as grounds therefor show:

ONE

This Court should have exercised discretionary jurisdiction because the state courts below failed to hold the ordinances in question unconstitutional on their face and as construed and applied because it plainly appears that said ordinances unduly abridge, burden, deny and prohibit petitioners' rights of free speech, free press and freedom to worship Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

This Court should have exercised discretionary jurisdiction because the state courts below failed to hold the Paris and Floresville ordinances unconstitutional on their face because in excess of the police power and prohibiting the exercise of constitutional rights of freedom of press, speech and worship within the boundaries of said cities, contrary to the First and Fourteenth Amendments to the United States Constitution.

THREE

This Court should have exercised discretionary jurisdiction because there was presented in each petition for writ of certiorari directly, expressly and certainly the question of whether under the law and practice of Texas the judgments could be fully reviewed on the record by the Court of Criminal Appeals of Texas by habeas corpus proceedings employed by each petitioner before said court.

FOUR

This Court should have exercised discretionary jurisdiction because the Court of Criminal Appeals unlawfully

discriminated against Jehovah's witnesses and denied petitioners' inalienable and inherent right to a writ of habeas corpus in violation of the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

On December 21, 1942, in the cases of *Mrs. Ella Jamison,* appellant, v. *State of Texas,* No. 558, and *Daisy Largent,* appellant, v. *State of Texas,* No. 559, the Court says: "Counsel are requested to discuss in their briefs and on oral argument whether under the law and practice of Texas the judgment can be fully reviewed on this record by a higher State court by habeas corpus or other proceedings."

Such memorandum of request for discussion and argument persuades us to believe that this honorable Court inadvertently overlooked the precise question which is directly involved in these cases. The question is better presented in these cases for determination than can be considered in the *Jamison* and *Largent* cases.

In Texas the habeas corpus remedy is not a substitute for appeal; and in cases where no direct appeal lies to the Court of Criminal Appeals from the lower courts, as in these cases, there is available in certain circumstances the writ of habeas corpus. The writ of habeas corpus is entirely separate and distinct and in addition to the original criminal proceedings brought against the accused defendant. Habeas corpus is no part of the original criminal proceedings. It is not compulsory under the decisions of this Court to employ a writ or process as a condition precedent to approach to this Court by appeal or by petition for writ of certiorari; however, when the writ is employed and the federal questions properly presented even though denied this Court can review the judgment in the habeas corpus proceedings the same as and in addition to exercising its right to review directly the judgment attacked in

the habeas corpus proceedings. It is our view that this Court has jurisdiction in the *Jamison* and companion *Largent* cases and that the questions which this Court desires to consider with respect to the right of habeas corpus in those two cases can *only* be considered in these three cases. The question can not be properly decided in the *Jamison* and *Largent* cases; for even though this Court holds that habeas corpus is available as a remedy in the Texas courts it would not deprive this Court of jurisdiction on appeal. Under the state statutes of Texas, Code of Criminal Procedure Article 53, the right of appeal to any higher court is expressly denied. This statute gives right of a direct appeal to this Court, which step was properly taken in the pending *Jamison* and *Largent* cases.

This Court's ruling in these three cases has, in effect, approved the action of the Court of Criminal Appeals in holding that the remedy of habeas corpus was not available to Jehovah's witnesses in Texas under circumstances similar to this. Inasmuch as the Court now indicates that there is a serious question as to whether or not habeas corpus is available in the courts of Texas, it is necessary to clarify the confusion resulting from the opinion in *Ex parte Largent,* 162 S. W. 2d 419, and this Court's action in denying certiorari in such case.

It is to be noticed that the Texas Court of Criminal Appeals for the first time in its history of existence held that the remedy of habeas corpus was available in circumstances such as these *only when* the ordinance was and is void and unconstitutional on its face. That court for the first time held that it could not determine whether or not the ordinance was or is unconstitutional as construed and applied to the particular facts in the case. See *Ex parte Largent,* 162 S. W. 2d 419, opinion also appearing in the printed record in cause number 349, pages 24-35. This unusual holding is contrary to the previous decision of that court in *Ex parte Baker,* 127 Tex. Cr. R. 589, 78 S. W. 2d 610, 613, where that court said: "It is a familiar rule that

the validity of an act is to be determined *not alone* by its caption and phraseology [*on its face*], but also by its practical operation and effect [as construed and applied to the facts]." [Bracketed words added] The decision also conflicts with *Ex parte Patterson,* 58 S. W. 1011, 42 Tex. Cr. R. 256; *Ex parte Roquemore,* 131 S. W. 1101; and *Ex parte Faulkner,* 158 S. W. 2d 525.

The holding of the Court of Criminal Appeals has split in two that class of cases properly cognizable by habeas corpus. If the ordinance is void on its face that court says the remedy is available; but if the ordinance is valid on its face but unconstitutional as construed and applied it does not have jurisdiction.

In this holding the Court of Criminal Appeals refuses to exercise its duty of construing a statute or ordinance to determine whether or not it is applicable to a given admitted and undisputed state of facts. In this that court has completely abdicated its duties to protect the citizens of Texas from unconstitutional abridgment of their rights.

That court justifies such conclusion by holding that in habeas corpus proceedings it is precluded from viewing the facts of the case supporting the judgment attacked. Such conclusion is contrary to a host of cases where the court considered the facts. *Ex parte Roquemore,* 131 S. W. 1101, 60 Tex. Cr. R. 282; *Ex parte Wall,* 91 S. W. 2d 1065; *Ex parte Meador,* 248 S. W. 348; *Ex parte Degener,* 17 S. W. 1111, 1115, and *Ex parte Kearby and Hawkins,* 34 S. W. 635 (962).

This Court has held, in *Mooney* v. *Holohan,* 294 U. S. 104, 113, that "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."

The writ of habeas corpus is unquestionably one of the fundamental, inalienable rights of the citizen. *Slaughter House Cases,* 16 Wall. 36, 79; *Corfield* v. *Coryell,* 4 Wash. (U. S.) 371, 380. See also opinion of Mr. Justice Roberts in *Hague* v. *C. I. O.,* 307 U. S. 496.

In Texas the writ of habeas corpus is declared to be the principal bulwark of human liberty in that State. *Ex parte Calhoun,* 91 S. W. 2d 1047.

In cases where the petition for writ of habeas corpus was brought for the purpose of reviewing the evidence to determine whether or not it was sufficient, or whether or not there was evidence to sustain the conviction, the Court of Criminal Appeals universally held to the rule that if there was no constitutional question or if the judgment was not void, it would not review by habeas corpus said judgment of conviction in instances where the case originated in the justice or corporation courts and the fine imposed on trial de novo did not exceed $100 and costs. To do so is held to be employing the writ to do indirectly what is prohibited directly by the Code of Criminal Procedure, Article 53. *Ex parte Kent,* 49 Tex. Cr. R. 12, 90 S. W. 168; *Ex parte Rogers,* 83 Tex. Cr. R. 152, 201 S. W. 1157, and *Ex parte Slawson,* 139 Tex. Cr. R. 607, 141 S. W. 2d 609.

There are many recognized exceptions to the above rule. We now turn to a discussion of the cases recognizing these exceptions for the purpose of showing that the decision of the court in the *Largent* case is fictitious evasion of a properly raised federal question and that the judgment of the court below is not based upon an adequate non-federal question.

In instances where the Court of Criminal Appeals found the ordinance or statute to be unconstitutional on its face the writ of habeas corpus has been unhesitatingly sustained to release one held under a judgment of conviction in the county court on trial de novo in appeals from the justice and corporation courts. In *Ex parte Patterson,* 42 Tex. Cr. R. 256, 58 S. W. 1011, the ordinance was void on its face because it prohibited a bowling alley within 100 yards of a residence. In *Ex parte Spelce,* 119 S. W. 2d 1037, a Dodd City ordinance prohibiting dance hall within 400 feet of churches was held void on its face. *Ex parte Faulkner,* 158 S. W. 2d 525, holds the "Green River" ordinance of Canyon

unconstitutional according to its unreasonable terms. *Ex parte Farnsworth,* 61 Tex. Cr. R. 342, 135 S. W. 535, holds an ordinance of Dallas establishing a commission to fix telephone rates, etc., unconstitutional on its face. In *Ex parte Battis,* 40 Tex. Cr. R. 112, 48 S. W. 513, it was an ordinance prohibiting commercial vehicles for hire from parking on certain downtown streets. *Ex parte Neill,* 32 Tex. Cr. R. 275, 22 S. W. 923, holds void a Seguin ordinance prohibiting sale in the city of a certain newspaper declared a nuisance. In *Ex parte Garza,* 28 Tex. Cr. R. 381, a San Antonio ordinance licensing bawdy houses held void on its face.

Prior to the decision of the Court of Criminal Appeals in *Ex parte Largent,* 162 S. W. 2d 419, it was uniformly held that even though the law be valid on its face, if the statute or ordinance did not apply to the facts in the case the defendant was not guilty and was entitled to a discharge by writ of habeas corpus when convicted on trial de novo in the county court and fined not more than $100. In *Ex parte Roquemore,* 131 S. W. 1101, 60 Tex. Cr. R. 282, the writ was granted to discharge the accused who had been convicted of violating the Sunday Law of Texas. He operated a baseball park and baseball game on Sunday. It was held that the statute when properly construed did not cover the activity of the defendant and on the admitted facts he was not guilty. This case was cited with approval by Judge Hawkins in *Ex parte Jarvis,* 3 S. W. 2d 84. In *Ex parte Jonischkiss,* 227 S. W. 952, 88 Tex. Cr. R. 574, it was held that the writ of habeas corpus was available to release one charged with a violation of a city traffic ordinance where the admitted facts did not constitute a crime under the law of Texas. In *Ex parte Butcher,* 53 S. W. 2d 781, 122 Tex. Cr. R. 39, an application for writ of habeas corpus was granted because the court declared that the operator of a laundry did not come within the provisions of a statute prohibiting labor of females more than 54 hours per week. See also

Ex parte Wall, 91 S. W. 2d 1065; and *Ex parte Jones,* 81 S. W. 2d 706.

Before the decision in *Ex parte Largent,* supra, it was consistently held by the Court of Criminal Appeals that whether an ordinance is constitutional depends on the facts to which it is applied. In *Ex parte Baker,* 127 Tex. Cr. R. 589, 78 S. W. 2d 610, 613, the ordinance fixing fees on non-resident business representatives was held to be arbitrary and violative of the 14th Amendment as applied. The writ of habeas corpus was granted. In that case the court said: "It is a familiar rule that the validity of an act is to be determined not alone by its caption and phraseology, but also by its practical operation and effect." In *Ex parte Lewis,* 45 Tex. Cr. R. 1, 73 S. W. 811, it was held that an ordinance valid on its face was unconstitutional because of the provisions of the city charter which was introduced in evidence. In *Ex parte Mihlfread,* 128 Tex. Cr. R. 556, 83 S. W. 2d 347, it was held that an ordinance providing for the license tax upon certain occupations was void because high, excessive and confiscatory under the circumstances of the case. In *Ex parte Ernest,* 136 S. W. 2d 595, 138 Tex. Cr. R. 441, an ordinance providing for sanitary inspection of bakeries was held valid as applied to institutions within the city but invalid as applied to institutions located outside the city. The court considered the evidence. In *Ex parte Kennedy,* 78 S. W. 2d 627, Judge Hawkins wrote the opinion on rehearing. On the original hearing the ordinance was held to be constitutional on its face and the writ was held properly denied. On rehearing, concerning the relator's attack upon the zoning ordinance the court said: "Relator seems to concede that said case is decisive of the question as to the *general attack* upon the constitutionality of said ordinance, but urges that it should be held unconstitutional, *as it relates to the restriction in the use of the particular property of relator involved in the prosecution.*" The court then inquires into the question as to whether the *valid ordi-*

nance has been applied in an unconstitutional manner, and holds that it is not violative of the Federal Constitution as applied. In *Ex parte Stein,* 135 S. W. 136, 61 Tex. Cr. R. 320, the court inquired into the evidence to determine the constitutionality of an ordinance. See *Ex parte Degener,* 17 S. W. 1111, 1114; *Ex parte Kearby,* 34 S. W. 635; 34 S. W. 962; and *Ex parte Dreibelbis,* 133 Tex. Cr. R. 83, 109 S. W. 2d 476.

In his opinion in the *Largent* case Judge Hawkins does not cite or discuss any of the foregoing cases but contents himself with a consideration of the cases originating in the justice or corporation court where there was no constitutional question involved and where habeas corpus was invoked as a substitute for appeal to review the sufficiency of the evidence. *Ex parte Slawson,* 139 Tex. Cr. R. 607, 141 S. W. 2d 609, is said to be controlling. There the defendant was convicted of breaching the peace and contended there was no evidence showing guilt. The case was not within the exception allowing use of the writ in such cases. What was contended in the *Largent* case was that the admitted facts or undisputed evidence showed that relator was not within the terms of the ordinance and if considered within such provisions then such application of the ordinance to the undisputed evidence violated the Federal Constitution.

Concerning the host of cases above enumerated Judge Hawkins in *Ex parte Largent,* supra, says: "If some cases from this court may be found which seem to be in conflict with such holding they are out of harmony with said Art. 53 and the great number of cases construing said article. Either that, or the claimed conflict is more apparent than real." (*Largent* R. 27) This shows that the real issue was evaded by that court. The dissenting opinion of Judge Graves in the *Largent* case clearly establishes the fact that the majority holding was fictitious, arbitrary and contrary to the established precedent of Texas.

Unless this Court so holds and reverses the *Largent* case it will be impossible now to say that there is an op-

portunity for a full review of a judgment of this sort in a higher court of Texas by way of writ of habeas corpus.

We insist that in view of the prior holdings of the Court of Criminal Appeals its decision in the case at bar is a bald, outright evasion and subterfuge and an arbitrary holding for the sole purpose of sidestepping the real federal question presented and to add to the suppression of the civil rights of the petitioners. *The refusal of the court to pass on the federal question properly presented is itself a denial of due process and is a federal question.* Because the judgment is not based on an adequate non-federal question this Court should take jurisdiction and consider all questions raised, including those which the Court of Criminal Appeals refused to consider. This action can be now taken on the authority of *People ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 70-71; *Rogers* v. *Alabama,* 192 U. S. 226, 230-231, where motion to quash struck because prolix and verbose; *Davis* v. *Wechsler,* 263 U. S. 22, 24, where waiver of venue was claimed by appearance; *Love* v. *Griffith,* 266 U. S. 32, where appeal dismissed because of alleged moot question; *N. Y. C. Ry. Co.* v. *N. Y. & Pa. Co.,* 271 U. S. 124, 126-127, where failure to appeal from former ruling held to be excuse for not considering questions; *German Savings & Loan Soc.* v. *Dormitzer,* 192 U. S. 125, 128, where estoppel held not to be sufficient to deny consideration of federal question; and *Patterson* v. *Alabama,* 294 U. S. 600, 603-607, where motion for new trial and bill of exceptions containing evidence struck by court.

The right to the remedy of habeas corpus is particularly discussed in greater detail in the petitions for writs of certiorari. See dissenting opinion of Judge Graves. *Largent* record pp. 28-35. See also *Hilley* petition pp. 13-16, 23-32; *Largent* petition pp. 18-23; *Killam* petition pp. 15-18. See motion for rehearing in *Largent* case, R. 36-45. We do not here repeat what is there said: Reference to such argument should be sufficient to direct this Court's attention thereto.

Federal Question Properly Raised and Considered Below

HILLEY CASE

The constitutionality and validity of the ordinance was duly raised in all of the courts below. On the trial *de novo* in the County Court by motion to quash (R. 8-10, 11-12), by requested charge number one (R. 10-11), by motion for directed verdict at the close of all the evidence (R. 20), and by specific allegations in the application for writ of habeas corpus filed in the District Court, petitioner attacked the ordinance in question as being in violation of the First and Fourteenth Amendments to the United States Constitution, because by its terms and as construed and applied, petitioner was denied her rights of freedom of press and worship of Almighty God.

In the Court of Criminal Appeals it was properly contended that the ordinance was unconstitutional and void, both on its face and as construed and applied. R. 27-28.

When the Court of Criminal Appeals, for the first time in its opinion filed in this case held that *habeas corpus* was not a proper remedy to relieve the petitioner of the unconstitutional judgment the petitioner duly attacked such holding for the first time that the holding denied petitioner the right of habeas corpus, contrary to the Fourteenth Amendment, in a motion for rehearing. (R. 30-32) This was a timely presentation. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313.

It is noticed that the Court of Criminal Appeals says that the court would entertain the writ of habeas corpus if the ordinance in question is void on its face. The only discussion by the court on this question was: "The ordinance was not violative of the Constitution." It is indeed amusing how lightly judicial precedent is spurned and disregarded by the Court of Criminal Appeals. In a pre-

vious decision that court had declared that the identical license tax ordinance of another city of Texas was void on its face and unconstitutional because in excess of the police powers of the state and in excess of its legislative authority. We make reference to the case of *Ex parte Dreibelbis,* 109 S. W. 2d 476. In that case the law was identical with the ordinance here. In that case the fine was only $1 in both the city and the county court. In that case the Court of Criminal Appeals said: "The fact that the tax is denominated a license fee does not make it such when in fact it appears from the face of the ordinance that the sum levied and denominated a license fee is not levied for the purpose of regulating the enumerated business, but to raise revenue. It appears to us that said ordinance is violative of section 1 of article 8 of our Constitution. The state has not levied an occupation tax on persons engaged in business of this character designated in said ordinance. A city under its police powers, does not have the legal right to levy an occupation tax, unless the state has levied such a tax." See also *Ex parte Terrell,* 40 Tex. Cr. R. 28, 48 S. W. 504; *ABC Storage and Moving Co.* v. *City of Houston* (Tex. Civ. App.) 269 S. W. 882.

This is further evidence of the manifest discrimination on the part of the Court of Criminal Appeals against petitioners in these cases.

It is manifest that the license tax in this case is also unconstitutional and violative of the United States Constitution, First and Fourteenth Amendments, because of its imposition of a burden upon the freedoms guaranteed and secured by those amendments. See *Hilley* petition pp. 11-13, 19-23.

See also petitions for writs of certiorari in *Busey et al.* v. *District of Columbia,* No. 235 October Term 1942; *Douglas et al.* v. *Jeannette et al.,* No. 450; *Murdock et al.* v. *Commonwealth et al.,* Nos. 480-487, and the motion for rehearing in *Jones* v. *Opelika,* etc., 316 U. S. 584-624, all of which are now pending here and undetermined on the same question.

A reading of those documents, which we incorporate herein by reference, conclusively shows that there is presented not only a substantial federal question but one of the most grave and serious questions that this Court has had to consider in its entire history of existence. The seriousness of the question presented and the arbitrary action by the court below in sidestepping the real controversy on a colorless technicality warrant a reconsideration by this Court of the petition for writ of certiorari in the *Hilley* case which commands that the Court grant the same.

LARGENT CASE

In the application for writ of habeas corpus in the District Court petitioner alleged that she was illegally restrained of her liberty. (R. 1) Under the Texas practice this allegation draws in question all federal and state constitutional questions as to whether or not the judgment of conviction is void. *Ex parte Calhoun,* 91 S. W. 2d 1047; *Ex parte Travis,* 123 Tex. Cr. R. 480, 273 S. W. 483, 489; *Ex parte Cox,* 53 Tex. Cr. R. 240, 109 S. W. 369; *Ex parte Mato,* 19 Tex. Cr. R. 112; *Ex parte Cain,* 56 Tex. Cr. R. 538, 120 S. W. 999; *Ex parte Walsh,* 59 Tex. Cr. R. 409, 129 S. W. 118; *Ex parte Patterson,* 42 Tex. Cr. R. 256, 58 S. W. 1011. The trial court under these allegations said: "The sole question is whether or not it is a valid ordinance." (R. 12, 16) In the Court of Criminal Appeals the constitutionality of the ordinance was attacked both on its face and as construed and applied because violating the First Amendment and denying due process of law in excess of the police powers of the City of Paris, contrary to the Fourteenth Amendment. (R. 20-21) The Court of Criminal Appeals specifically considered and decided these two *federal* questions, and held the ordinance constitutional on its face. R. 24-25.

This was a sufficient, proper and timely way of raising a constitutional question. Under the practice of Texas a constitutional question can be raised at any time, for the

first time on appeal or on motion for rehearing in the appellate court. *City of Amarillo* v. *Tutor,* 267 S. W. 697; *Hoffman* v. *State,* 20 S. W. 2d 1057; *Burnes* v. *State of Texas,* 75 Tex. Cr. R. 188, 170 S. W. 550; *Gohlman,* etc. v. *Whittle,* 273 S. W. 808; *Texas Jur.,* Vol. 9, p. 469.

Under the accepted and recognized procedure of this Court, if an appellate court actually considers a federal question presented to it the first time and actually decides the federal question for the first time in the appellate court, it is sufficient, adequately and timely raised so as to require this Court to consider and decide the question. *People of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 66-69, 70-71; *Stewart* v. *Kahn,* 11 Wall. 493, 494, 495, 499, 500-502. In these cases the federal question as to constitutionality of the ordinances on their face under the Federal Constitution was actually considered. In *Manhattan Life Ins. Co. of New York* v. *Cohen,* 234 U. S. 123, 134, this Court said that it is an "elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a [state] court . . . when it appears that such question was actually considered and decided." See also *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Commission,* 297 U. S. 471, 473.

Please note that under the record the federal questions with respect to the unconstitutionality of the ordinances were timely and properly raised, because under the law of Texas such questions could be raised at any time as late as the motion for rehearing. The judgment of the court is based on want of jurisdiction, which is fictitious, and not that the questions were improperly or untimely raised. In so far as the ordinances in question are held to be constitutional on their face, there can be no doubt that the Court of Criminal Appeals considered and passed on such federal questions. Being so, it is immaterial to this Court that such federal questions are not fully raised in the *Largent* and *Killam* cases in the trial court because the Court of Criminal Appeals passed upon same. This was the holding of this

Court in the case of *Home Ins. Co.* v. *Dick* (1930) 281 U. S. 397, 407, where the Texas Supreme Court was reversed on federal questions not raised in the trial court but considered by the State Supreme Court.

It must also be noticed that the question of the unconstitutional denial of the writ of habeas corpus contrary to the Fourteenth Amendment was presented for the first time in the motion for rehearing. This was the first opportunity which petitioner had of urging the question to the court below. The motion was overruled. This was a timely presentation of this federal question. See *Brinkerhoff-Faris Trust & Saving Co.* v. *Hill,* 281 U. S. 673.

The ordinance in question is unconstitutional and void on its face. See *Lovell* v. *Griffin,* 304 U. S. 444; *Schneider* v. *State,* 308 U. S. 147.

The fact that it may be a convenience to a municipality to prevent the selling of newspapers, literature and pamphlets upon the street is not justification for abridging or denying the rights of persons upon the streets to use the sidewalks for information and for distribution of literature. In the case of *Schneider* v. *State,* supra, Mr. Justice Roberts speaking for the United States Supreme Court said: "But as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press. . . . "

In that case ordinances which prohibited the use of the streets of various cities for the purpose of distributing handbills and leaflets were declared unconstitutional, because as construed and applied they abridged petitioners' rights of freedom of speech and of press. The ordinances there knocked down cannot be distinguished from the ordinance here questioned. The case of *Hague* v. *C. I. O.,* 307 U. S. 496, 501, 518, invalidates an ordinance forbidding any person to

"distribute or cause to be distributed or strewn about any street or public place any newspaper, paper, periodical, book, magazine, circular, card, or pamphlet." In that case the court said: "But it must not in the guise of regulation be abridged or denied." See also *Thornhill* v. *Alabama,* 310 U. S. 88, and *Carlson* v. *California,* 310 U. S. 106, where the ordinances and statutes prohibiting the carrying and displaying of signs that might cause a breach of the peace or obstruct traffic were declared invalid and void because abridging the fundamental personal rights and freedoms guaranteed by the Constitution.

In *Jones* v. *Opelika,* 316 U. S. 584, 595-596, 62 S. Ct. 1231, Mr. Justice Reed, speaking for the majority of this Court, said: "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori,* invalid."

Even when applied to commercial peddling of ordinary articles of merchandise the ordinance in question comes clearly within the prohibition of the above mentioned cases and there is no valid reason that can be advanced to sustain the validity of the ordinance. See Freund's "The Police Power", page 133. The prohibition of the use of the streets is invalid because constitutional guarantees cannot be made to yield to mere convenience. *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402. See also *Smith* v. *Texas,* 233 U. S. 630; *Dobbins* v. *Los Angeles,* 195 U. S. 223; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 25; *Eubank* v. *Richmond,* 226 U. S. 137; *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission,* 294 U. S. 613, 622.

In the case of *Schneider* v. *State,* supra, it is said: "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." In *Hannan* v. *Haverhill,* 120 F. 2d 87, it is said: "Restrictions properly applicable to hawkers and peddlers selling ordinary articles of merchandise on the streets might not be appropriate to

regulate the sale and distribution of literature of the sort offered for sale by the plaintiffs." See also *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 and footnote.

In the cases of *Zimmermann* v. *Village of London,* 38 F. Supp. 582, and *Donley* v. *City of Colorado Springs,* 40 F. Supp. 15, ordinances which prohibited peddlers from entering premises of residents in the city without prior invitation were held unconstitutional when applied to activity of Jehovah's witnesses because of the *first and fourteenth* amendments to the Federal Constitution. In the *Donley* case, supra, the court held that the ordinance would have been valid when applied to ordinary articles of merchandise.[1]

We have searched the reports for a case in point where the identical kind of ordinance is involved and find only the case of *Ex parte Walrod,* 120 P. 2d 783, decided by the Oklahoma Criminal Court of Appeals, where that court had before it for review the case of one of Jehovah's witnesses who had been unlawfully imprisoned and restrained in the city jail of Stillwater, Oklahoma, for the alleged violation of Ordinance No. 611 of that city holding unlawful the distribution of literature "on the streets and sidewalks of the congested business district of the City of Stillwater, Oklahoma, and said congested business district is defined as being the territory included from Fifth Avenue to Eleventh Avenue and between Hudson Street and Lewis Street." The ordinance was held to be unconstitutional and void because abridging the rights of freedom of speech and of the press contrary to the state and federal constitution. See also *Ex parte Winnette,* 121 P. 2d 312.

While the ordinance does not prohibit distribution of literature in the entire city by name it does prohibit in its practical effect because the main business district of the city which is the only likely place that one would want to

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[1] Compare *White* v. *Town of Culpeper,* 172 Va. 630; *City of Orangeburg* v. *Farmer,* 181 S. C. 143; *De Berry* v. *La Grange,* 8 S. E. 2d 146; *City of Columbia* v. *Alexander,* 119 S. E. 241.

distribute literature is included within its prohibitory terms. A person disseminating ideas by pamphlet form on a political, educational, religious, Bible or "Christian" subject would not desire to stand in a desolate or out-of-way place to circulate his ideas where there were only few people, but a reasonable person necessarily must go and is guaranteed the right to go to a place where he is likely to contact the most people, such as the public streets and sidewalks of the business section of the city. The fact that such are crowded at times does not allow a prohibition of the right as long as the distributor does not abuse the privilege by *himself* blocking the sidewalk or obstructing traffic, etc., in which event he can be punished for the abuse under a law directed at the abuse; but he cannot be denied the right to use the streets under prohibitory ordinances, because such ordinances are void. It should be mentioned here that the undisputed evidence shows that petitioner did not abuse the exercise of such rights. She did not obstruct traffic, block the sidewalks, nor did she annoy or offend any one—on the contrary, she acted properly and in an appropriate manner.

The City of Paris is a community of about 18,000 people and the area prescribed in the ordinance includes practically the entire downtown district. It includes the entire section of the town where people are likely to come in great numbers to shop, attend theaters, make purchases at the market, and do other business at night time and particularly all day Saturday and Saturday night. It is at such times and places that one desiring to disseminate information and opinion would exercise press activity. If he is denied the right to exercise such activity in and around the business district he is in fact denied the right to exercise such right anywhere within the city, for one would not desire to stand on a desolate street corner in the residential area, where only few or no people pass, to distribute literature. In fact the officials of the City of Paris have stated, 'These named "appropriate places" are denied you for

the purpose of exercising your liberty because "it may be exercised in some other place" such as the unused residential area and other places in the city which are not frequented by visitors.' This is exactly what was condemned by this Court in the *Hague* case and in the *Schneider* case.

The City of Paris has isolated a certain portion of the city and designated it, in effect, as the "most holy" spot in the city and excluded therefrom every person who might desire there to exercise his fundamental personal rights guaranteed by the Constitutions. It discriminates against such persons in favor of the established merchants, with whom petitioner does not compete, and who operate commercial stores dealing in ordinary goods, wares and merchandise of the "butcher, baker and candle-stick maker" variety. The city has thus erected a legal "Chinese wall" around such area of the city for the benefit of such persons and admits therein only those who come to deal with said merchants. The unique need and qualities of such established commercial merchants and their customers do not justify the action of the city in denying the use of the streets which, according to *Hague* v. *C. I. O.*, supra, and *Schneider* v. *State,* supra, are dedicated to the general public welfare and for use by ALL persons for lawful and constitutional purposes. There is no showing or contention on the part of the city that can justify the use of the ordinance to abridge fundamental personal rights. There is no showing that the exercise of such rights on the streets presents such a problem of "clear and present danger" that the traffic upon the streets and sidewalks of the area would be interrupted by persons distributing literature. A lawful business cannot be subjected to unreasonable regulations or prohibitions under the police power having no reasonable relation to public safety. *State* v. *Paille,* 90 N. H. 347.

In further consideration of the question here presented reference is made to *Commonwealth* v. *Johnson,* 35 N. E. 2d 801; *Commonwealth* v. *Reid,* 144 Pa. S. C. 569, 20 A.

2d 841; *Lovell* v. *Griffin,* 303 U. S. 444; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Douglas* v. *City of Jeannette,* 39 F. Supp. 32; *Hough* v. *Woodruff,* 147 Fla. 299, 2 So. 2d 577; *Kennedy* v. *City of Moscow,* 39 F. Supp. 26; *State* v. *Greaves,* 112 Vt. 222, 22 A. 2d 497; *Wilson* v. *Russell,* 146 Fla. 539, 1 So. 2d 569; and *Beeler* v. *Smith,* 40 F. Supp. 139.

The ordinance is not regulatory as to time and place, but it is *prohibitory* as to time and place. There is no time and no place within the area included by the ordinance that one can exercise his activity secured by the Constitution against abridgment. It is manifest that the ordinance is *prohibitory* by its terms and this question does not deserve further argument.

Again we remind the Court that the ordinance of the City of Paris is entirely different from the ordinance involved in the appeal from the County Court of Lamar County. See pages 3-4 of the petition of this case and pages 2-3 of the JURISDICTIONAL STATEMENT in *Largent* v. *State of Texas,* No. 559, October Term 1942.

KILLAM CASE

In the application for writ of habeas corpus filed in the County Court petitioner alleged that the ordinance denied him his constitutional rights of freedom of press and of worship of Almighty God. (R. 4) This was more than required by the Texas procedure. See cases cited with *Ex parte Calhoun,* supra, pages 10-17 et seq., this brief.

In the Court of Criminal Appeals the ordinance was attacked as void on its face and as construed and applied because contrary to the First and Fourteenth Amendments to the United States Constitution and in excess of the police powers because of its prohibitory nature. (R. 15) The Court of Criminal Appeals considered the questions as to whether void on its face and held in favor of the validity of the ordinance. (R. 12-13) The federal questions were adequately presented and determined by the court

below. *People of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 66-69, 70-71; *Manhattan Life Ins. Co. of New York* v. *Cohen,* 234 U. S. 123, 134.

The ordinance was void on its face because prohibitory of all press activity in the city. See pages 19 to 24, supra.

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This Court should have clearly in mind that two federal questions are here presented. *First:* Whether or not the ordinances are violative of the Federal Constitution for the reasons stated. *Second:* Whether or not the Court of Criminal Appeals discriminated against petitioners so as to deny them their inalienable right of habeas corpus contrary to the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

As to the *Hilley* case there can be no question that the presentation of the federal question in respect to the ordinance questioned was presented in conformity with the strictest requirement of this Court; and by reason thereof, as to that case, the question is properly before this Court.

As to the *Largent* and *Killam* cases it is plain that the federal questions were presented to the trial court in conformity with the *state practice,* and that even when considered as not having been raised until the cases reached the Court of Criminal Appeals such federal questions here presented were expressly presented to that court in harmony with the prevailing state practice. (*Largent* R. 20-21; *Killam* R. 15-16) This was timely under Texas practice. *Ex parte Calhoun,* pp. 10-17 et seq., supra, this brief.

The Court of Criminal Appeals actually considered the federal questions presented as to whether the ordinances were void on their face. *Largent* R. 24-25; *Killam* R. 8-9.

In all three cases the federal questions with respect to the ordinances were properly and timely presented and were passed upon sufficiently by the Court of Criminal Appeals to require consideration by this Court.

With respect to the *Second* question, page 25, supra, this brief, as to whether or not there has been an unconstitutional discriminatory denial of the writ of habeas corpus, there cannot be any doubt that the question was timely and properly presented to the Court of Criminal Appeals. This Court has uniformly held that where a *"surprise"* holding is rendered by an appellate court which makes it impossible to raise the question sooner the motion for rehearing is timely method of presenting the question. The denial of the motion constituted a sufficient passing upon the question to give this Court jurisdiction. See *Brinkerhoff-Faris T. & S. Co.* v. *Hill,* 281 U. S. 673.

This Court should grant the petitions for writs of certiorari as was done by this Court in *Tinsley* v. *Anderson,* 171 U. S. 101, 105. In that case this Court said:

"But the appellate jurisdiction of this Court from the state court extends to a final judgment or decree in any suit, civil or criminal in the highest court of a state where a decision in the suit could be had, against a title, right, privilege, or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States. Rev. Stat. 709. Consequently, if the order of the Court of Criminal Appeals of the State of Texas, being the highest court of the state having jurisdiction of the case, dismissing the writ of habeas corpus issued by one of its judges, and remanding the prisoner to custody, denied to him any right specially set up and claimed by him under the Constitution, laws, or treaties of the United States, it is doubtless reviewable by this Court on writ of error [and writ of certiorari]." [Bracketed words added]

Under all the circumstances this Court must assume jurisdiction in these cases to prevent a rank injustice being done the petitioners. In *Cohens* v. *Virginia* (1821) 6 Wheat. 264, 404, Mr. Chief Justice Marshall said:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature

may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

The statement of this Court on December 21, 1942, to the effect that it desires counsel in the *Jamison* and *Largent* appeals to brief the question of "whether under the law and practice of Texas the judgment can be fully reviewed on this record by a higher State court by habeas corpus or other proceedings", certainly cast grave uncertainty as to the correctness of this Court's rulings in these cases.

If this Court rules that the remedy was available in a higher court of Texas, then the Court of Criminal Appeals was wrong in its decisions in these cases. If this Court concludes that the remedy of habeas corpus is available, then it would be proper to reverse the judgments of that court in these cases and direct that court to consider the question of whether or not the ordinances were unconstitutional *as construed and applied.* If this Court dismisses the appeal in the *Jamison* and companion *Largent* cases for this reason, then the appellants in those cases, the petitioners in these cases, and all other of Jehovah's witnesses similarly situated would not have a remedy in the state courts because the decisions in the present cases stand as the law of the State of Texas. The judgment of the Court of Criminal Appeals in these cases then will continue to stand and will not be reversed by a holding of "want of jurisdiction" in the *Largent* and *Jamison* appeals. Therefore the questions presented in these cases are so serious and substantial that they deserve a further and full discussion of the question involved. The procedural question which the Court

wants discussed in the *Jamison* and companion *Largent* cases is directly involved in these cases. To the end that a full discussion can be had the order and judgment of this Court heretofore rendered denying the three petitions for writs of certiorari should be set aside and held for naught and an order rendered granting certiorari on each of the three petitions for writs of certiorari.

Petitioners would show that although the notice has been issued by this Court to the courts below of the denial of certiorari in each of these cases, at this time petitioners are at liberty under bond which indemnifies the respective judgments rendered against them and none of them have as yet served their time in jail to satisfy the fines imposed. Therefore the controversy in these cases is still alive and the questions here presented are not moot.

WHEREFORE, each petitioner prays that the orders and judgments heretofore entered in each of the above entitled and numbered causes denying certiorari be set aside and held for naught and that on this motion for rehearing, the petitions for writs of certiorari, and the supporting briefs, the Court issue a writ of certiorari in each case to the Court of Criminal Appeals of Texas directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decrees of the said court affirming the judgment of each trial court be reversed and that each of your petitioners have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

MRS. JOHN HILLEY, *Petitioner*
DAISY LARGENT, *Petitioner*
TULLY B. KILLAM, *Petitioner*

By HAYDEN C. COVINGTON
Attorney for Petitioners

CERTIFICATE

I, Hayden C. Covington, do hereby certify that the foregoing motion for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON

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